

CALIFORNIA COASTAL COMMISSION

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Wed 9a

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AMENDMENT REQUEST
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: A-133-79-A1/F6760-A2

Applicant: Ure & Diane Kretowicz

Agent: SB&O, Inc. & Matt Peterson

Original Construction of a 3,066 sq. ft. first floor addition to an existing 1,350 sq. ft.
Description: two-story, single-family residence on a 1.3 acre blufftop site.

Proposed Amendment: 1) Replace the requirement that the property owner offer to dedicate a vertical public access easement with a) an easement for emergency lifeguard access and b) contribute \$10,000 for public access improvements in the La Jolla area; 2) remove unpermitted improvements including, but not limited to, wooden timber stairs, retaining walls and palm trees on the face of the coastal bluff; 3) modify an existing retaining wall located in the yard (blufftop) of the site; and, 4) install patio, barbecue, landscaping and modifications to the existing garage, including a car lift and storage area.

Site: 7957 Princess Street, La Jolla, San Diego, San Diego County.
APN 350-151-01 & -02

STAFF NOTES:

The Regional Coastal Commission's original approval of the application (F6760) for an addition to a single-family residence was appealed to the State Coastal Commission in 1978. The Commission found that the appeal raised no substantial issue. However, a lawsuit was filed against the Commission for, among other things, not having made adequate findings regarding public access pursuant to Section 30604 of the Act. The court ordered that the matter be remanded back to the Regional Commission for a specific finding on only the issue of public access and recreation. The court allowed the development to go forward in the interim because the petitioners failed to post the necessary bond for their stay. The Regional Commission adopted findings regarding public access but did not impose any requirement for provision of public access at the site. This decision was then appealed to the State Commission (A-133-79) who found that the appeal raised a substantial issue. On de novo, the State Commission approved the project with an additional condition that required the applicant to record an offer to dedicate a vertical public access easement (from Princess Street down the bluff to the

beach), as well as a lateral public access easement. The Commission found that without this condition, the addition would interfere with existing public access (ref. Exhibit #3). The State Commission found that because the residential addition displaced a blufftop viewpoint and trail to the beach on the site, that public access should be required elsewhere on the site. Thus, the State Commission required that the applicant record an offer-to-dedicate (OTD) easement for public access extending from Princess Street to the mean high tide line. However, as noted above, the court had allowed the applicant to continue with the development under the original permit because the petitioners failed to post the necessary bond for their stay while the Commission reviewed the proposal again on remand, and thus, the requirement for recordation of the OTD occurred after the development was already complete. The applicant never recorded the offer required by the State Commission.

Summary of Staff's Preliminary Recommendation:

Staff recommends that the Commission take one vote adopting a two-part resolution, which would approve portions of the development and deny other portions of the development. Staff recommends the Commission **approve** the applicant's request for after-the-fact approval for the removal of the unpermitted improvements from the bluff face, modifications to an existing retaining wall located on the blufftop and installation of other accessory improvements (with the exception of a portion of the proposed rear yard patio), including modifications to an existing garage to include a car lift and storage area. These proposed improvements will not alter the project's consistency with geologic stability or protection of public views or interfere with the previously required public access easement location.

Staff recommends that the Commission **deny** the applicant's request for (1) replacement of the requirement to offer to dedicate a vertical public access easement with (a) an offer to dedicate a vertical easement solely for emergency lifeguard access and (b) contribute \$10,000 to the Coastal Conservancy for public access improvements in the area and (2) authorization for a portion of the proposed rear-yard patio. The proposal to replace the previously required offer to dedicate public access easement with an easement for emergency lifeguard access and \$10,000 for public access improvements in the area is inconsistent with the public access policies of the certified LCP and the public access and recreation policies of the Coastal Act. The applicant's proposal is also inconsistent with the Commission's findings and condition of approval of CDP A-133-79. The Commission previously found that a pedestrian trail to the bluff and beach would be impacted by the originally approved home addition and thus, required an offer to dedicate access easement in a different alignment on the site. Moreover, allowing the removal of the requirement to record an offer to dedicate a vertical public access easement across the subject site (and allow emergency access only) would set an adverse precedent for other projects where historic public access has been documented. While replacement access to the small pocket beach at the base of the coastal bluffs at this location may require some improvements by the accepting entity, that is not a reason to eliminate the requirement for an access easement, as the prior access trail was heavily used before it was blocked by

construction of the addition to the residence. The required replacement accessway should be preserved so as to allow it to be accepted and possibly improved in the future.

Standard of Review: The City of San Diego certified Local Coastal Program (LCP) & and the public access and recreation policies of the Coastal Act.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following two-part resolution. The motion passes only by an affirmative vote of a majority of the Commissioners present.

MOTION: *I move that the Commission adopt the staff recommendation to approve in part and deny in part the proposed amendment to Coastal Development Permit No. A-133-79/F6760, with the approval subject to the conditions recommended by staff, by adopting the two-part resolution set forth in the staff report.*

RESOLUTION:

Part 1: Approval with Conditions of a Portion of the Development

The Commission hereby **GRANTS, as conditioned**, a coastal development permit amendment for the portion of the project consisting of the request for after-the-fact approval of (1) removal of unpermitted improvements, including wooden timber stairs, retaining walls and palm trees on the face of the coastal bluff; (2) modifications to an existing retaining wall located in the yard (blufftop) of the site; (3) installation of a barbecue, and portions of the rear yard patio and landscaping that are not sited in the alignment of the public access easement required by CDP A-133-79 ; and (4) modifications to the existing garage to install a car lift and storage area and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the certified Local Coastal Program and the public access policies of the Coastal Act, and will not have any significant adverse effects on the environment within the meaning of the California Environmental Quality Act.

Part 2: Denial of the Remainder of the Development

The Commission hereby **DENIES** a coastal development permit amendment for the portion of the project consisting of: (1) the modification of the special condition requiring recordation of an offer to dedicate ("OTD") both vertical and lateral public access easements by replacing the requirement for the *vertical* public access easement with a requirement for a vertical easement solely for emergency lifeguard access; (2) the addition of a requirement to pay \$10,000 for public access improvements in the area on a blufftop lot on Princess Street in La Jolla, to compensate for the elimination of public access to the bluff and beach on the site; and (3) the additional authorization to construct the portions of the proposed rear yard patio and fence that are sited in the alignment of

the public access easement required by CDP A-133-79; and adopts the findings set forth below, on the grounds that the development and the amended permit would not be in conformity with the provisions of the certified Local Coastal Program and the public access policies of the Coastal Act, and would result in significant adverse impact on the environment within the meaning of the California Environmental Quality Act that are avoidable through feasible mitigation measures and/or alternatives to the proposal.

II. Special Conditions.

The permit amendment is subject to the following conditions:

1. Revised Final Plans. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit to the Executive Director for review and written approval, final plans for the proposed development, including a site plan that has been approved by the City of San Diego. Said plans shall be in substantial conformance with the plans prepared by SB&O, Inc. Planning Engineering Surveying, dated 9/8/04, except they shall be revised as follows:

- a. The location of the offer to dedicate a vertical public access easement, as required pursuant to CDP #A-133-79 shall be clearly delineated on the site plan. The easement shall be 5 ft. in width and shall commence at the street along the southern side yard in the area where there are steps. Beyond the existing steps/stairway the access easement shall extend in a northwesterly direction along the top of the slope until it reaches the alignment of the historic path where it then extends in a southwesterly direction, traversing down the face of the bluff, to the beach (ref. Exhibit No. 3).
- b. No fencing and/or patio improvements shall be permitted in the side yard (south of the residence) within the area of the Offer-to-Dedicate Access Easement as delineated in the site plan approved by the Executive Director pursuant to subsection (a) above. No other improvements shall be permitted which would interfere with this access easement.
- c. All existing and proposed accessory improvements shall be identified. All accessory improvements (including, but not limited to, patios, decks, walkways, and open shade structures) proposed within the rear yard (west of the residence adjacent to the coastal bluff) area must be "at-grade" and located no closer than 5 ft. from the edge of the existing slope/bluff, as delineated on the site plan and as shown on Exhibit No. 2 to the May 23, 2005 staff report.
- d. The rear yard patio shall be revised to remove all portions that lie within the 5 ft. wide public access easement location.

The permittee shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment

to this coastal development permit unless the Executive Director determines that no amendment is legally required.

2. Accessory Improvements. In the event that erosion or bluff failure threatens the retaining wall located in the rear yard (west of the residence adjacent to the coastal bluff) of the site, patio, barbecue or landscaping, the threatened improvement(s) shall be removed. The retaining wall located in the rear yard of the site, patio, barbecue and landscaping are authorized to remain in place only until they are threatened by erosion or bluff failure. The approval of this permit shall not be construed as creating a right to shoreline protection under the certified LCP for such structures. By acceptance of this permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices that may exist under the certified LCP. Prior to removal of the retaining wall located in the rear yard of the site, patio, barbecue or landscaping, the permittee shall obtain a coastal development permit for such removal unless the Executive Director determines that no permit is legally required.

3. Revised Landscape/Yard Area Fence Plans. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit to the Executive Director for review and written approval, revised landscaping and fence plans approved by the City of San Diego. The plans shall be in substantial conformance with the plans as submitted by SB&O, Inc. Planning Engineering Surveying, dated 9/8/04, except for the revisions cited below. The plans shall be revised to keep the side yard (south of the residence) clear to enhance public views from the street toward the ocean. Specifically, the plans shall be revised to incorporate the following:

- a. A view corridor a minimum of 4 ft. wide shall be preserved along the southern side yard. All proposed landscaping in the southern yard area shall be maintained at a height of three feet or lower to preserve views from the street toward the ocean.
- b. All landscaping shall be (1) drought-tolerant and native or (2) non-invasive plant species (i.e., no plant species listed as problematic and/or invasive by the California Native Plant Society, the California Exotic Pest Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property).
- c. No permanent irrigation shall be permitted on the site.
- d. Any proposed fencing in the yard areas (not located within the Offer-to-Dedicate access easement areas as delineated in the site plan approved by the Executive Director pursuant to Special Condition 1(a)) shall not obstruct public views toward the ocean and shall have at least 75 percent of its surface area open to light.

- e. A written commitment by the applicant that all required plants on this site shall be maintained in good growing condition and whenever necessary, shall be replaced with new plant materials to ensure compliance with the approved landscape requirements shall be included.
- f. A written commitment by the applicant that five years from the date of the issuance of the coastal development permit, the applicant will submit for the review and written approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect, that certifies whether the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

The permittee shall undertake the development in accordance with the approved landscape and fence plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.

4. Prior Conditions of Approval. All other terms and conditions of the original approval of Coastal Development Permits #A-133-79 and #F6760 not specifically modified herein, shall remain in full force and effect.

5. Assumption of Risk, Waiver of Liability and Indemnity

- A. By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from bluff retreat and erosion; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

6. Deed Restriction. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit amendment a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit amendment, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit amendment as covenants, conditions and restrictions on the use and

enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit amendment. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit amendment shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

7. Condition Compliance. **WITHIN 60 DAYS OF COMMISSION ACTION ON THIS CDP APPLICATION**, or within such additional time as the Executive Director may grant for good cause, the applicant shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to issuance of this permit amendment. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

III. Findings and Declarations.

The Commission finds and declares as follows:

A. General Findings Applicable to Both Approval in Part and Denial in Part

1. Amendment Description. The proposed project represents an amendment to a coastal development permit approved by the Commission for the construction of a 3,066 sq. ft. addition to an existing 1,350 sq. ft. single-family residence. The proposal is to replace the requirement that the property owner record an offer to dedicate a vertical public access easement with: (1) an offer to dedicate a vertical easement solely for emergency lifeguard access and (2) contribute \$10,000 to enhance coastal access or other coastal improvements in the La Jolla area. To accomplish this, the proposed amendment would have to (1) modify the sole special condition of permit A-133-79, which required recordation of an Offer to Dedicate (OTD) both vertical (from Princess Street down the bluff face to the beach) and lateral public access easements, to limit the terms of the vertical easement to being only for emergency lifeguard access; and (2) impose a new condition requiring the payment of \$10,000 (to the Coastal Conservancy) for public access improvements in the area of the project site and recording of an easement for emergency access only. Also sought is after-the-fact approval for the removal of unpermitted improvements on the subject site consisting of rear wood timber stairs, a portion of a retaining wall within the five foot coastal bluff setback, palm trees and the irrigation system. In addition, the amendment would authorize proposed new physical construction. The proposal includes construction of an at-grade concrete patio, barbeque counter, area drains, staircase, interior garage improvements and landscaping. The proposed garage improvements include excavation and removal of approx. 130 cy. of uncompacted fill material to allow an additional parking space, which includes a car lift and storage.

The 1.31 acre site is situated atop a 55-ft. high coastal bluff located off a cul-de-sac at the northern terminus of Princess Street in the La Jolla community of the City of San Diego.

The existing residence is situated on the flatter portion of the site, directly adjacent to Princess Street, with the site sloping steeply down from the home to the north and west. There is no existing shoreline or bluff protection on the subject site. Surrounding development includes single family homes to the east and south and the Pacific Ocean to the north and west.

The City of San Diego has a certified LCP, and the subject site is within the City's permit jurisdiction. However, since the subject application represents an amendment to a Commission-approved coastal development permit, the Commission has jurisdiction over this application. Nevertheless, the standard of review is the certified LCP (the City's Land Development Code and La Jolla Land Use Plan) and, because the subject site is between the sea and the first public road, the public access and recreation policies of the Coastal Act.

2. Detailed Project History. The home on the site was originally constructed around 1915. Over the years, the home was added to and remodeled several times. In June of 1977, the Regional Commission denied an application (#F5265) for a substantial addition (3,300 sq. ft.) to the 1,350 sq. ft. home on the site, finding that the development would have a significant adverse impact on scenic resources in the area as it would significantly encroach onto the visually prominent bluff seaward of the existing home.

In June of 1978, the Regional Commission approved CDP #F6760 for construction of a 3,066 sq. ft. addition to the existing 1,350 sq. ft. single-family residence, finding that this "scaled-back" version of the previous application did not project further seaward than the existing line of development, thereby reducing its impact on visual resources. The permit was approved with special conditions requiring that the development comply with the recommendations of the geology report, that the southwest corner of the proposed addition (15 ft. x 15 ft.) be cantilevered to "ensure the integrity of the slope", and that the final drainage plans be submitted. The decision on this matter was subsequently appealed to the State Commission (A-221-78), but the State Commission found that the appeal raised no substantial issues on July 18, 1978. The grounds for the appeal were that inadequate public access findings were made.

A lawsuit was then filed against the Commission for, among other things, not having made adequate findings regarding public access and recreation as required by Section 30604 of the Coastal Act for development located between the first public road and the sea. The court subsequently found that the development was located between the first public road and the sea and that the finding on public access and recreation was not sufficiently specific to comply with the requirements of Section 30604(c) of the Act. The court ordered that the matter be remanded back to the Regional Commission for a specific finding on only the issue of public access and recreation. In addition, the court allowed the development to go forward in the interim because the petitioners failed to post the necessary bond for a stay. The Regional Commission subsequently adopted more specific findings regarding public access and recreation but did not impose any special requirements for the provision of public access at the site. This decision was then also appealed to the State Commission (A-133-79). On September 20, 1979, the State

Commission found that additional public access provisions should be required, as the new addition displaced a trail that had historically and continuously been used by the public for access to the shoreline below, adequate access did not exist nearby, and the new addition also displaced a viewpoint on the bluff. The Commission imposed a special condition on the permit requiring the applicant to record offers to dedicate both lateral (across the ocean frontage of the parcel from the toe of the bluff to the mean high tide line) and vertical (5 ft. wide extending from street down the bluff to the mean high tide line) public access easements. By the time the Commission imposed the access conditions, the applicant had already completed construction of the proposed addition in compliance with the permit as previously issued (ref. Exhibit No. 2 which shows the footprint of the residence at the time prior to the addition(s) and the footprint of the permitted addition(s) approved pursuant to CDP #F6760). Therefore, the State Commission required that the vertical access be located in a slightly different location than the historic trail in order to accommodate the addition. The offers to dedicate access were not recorded. Because the permit for the addition was issued during the litigation and appeal, it was issued with the number F6760. When the State Commission heard the appeal it gave the permit a new number – A-133-79. Therefore, the permit for the addition is identified by both numbers: A-133-79/F6760.

Then, in 1980, the applicant requested and received approval of an amendment to the permit to authorize drainage structures which had already been constructed without authorization. That is, the applicant implemented the drainage improvements without authorization and subsequently received approval through an after-the-fact permit amendment for the revised drainage plans.

In 1999, the City of San Diego approved a Coastal Development Permit for construction of a pool with spa, a concrete deck, barbecue counter, retaining walls, drains and landscaping in the rear yard of the blufftop site that contains the existing single-family residence. The proposal also included removal of a number of existing unpermitted improvements (wooden timber stairs, retaining walls and palm trees) on the face of the coastal bluff. No changes to the existing single-family residential structure were proposed. The Commission appealed the subject approval as A-6-LJS-01-95 on 6/25/01. The basis of the appeal was that the proposed development was allegedly inconsistent with the certified LCP as it related to blufftop setbacks, geologic hazards, protection of public views and public access. In particular, a swimming pool was proposed projecting beyond the bluff edge of the subject site. The certified LCP requires such structures to be sited a minimum distance of 25 feet from the edge of the bluff. A second major issue raised with the project was that it was inconsistent with the conditions of approval of Coastal Development Permit #A-133-79/F6760, which required recordation of an offer for a public vertical access easement across the subject site.

The appeal was thus scheduled for Commission review. On August 6, 2001, the Commission found that a Substantial Issue existed with respect to the grounds on which the appeal was filed. The de novo review of the permit application was subsequently scheduled for the Commission's October, 2001 meeting and then again at its June, 2002 meeting. Both times the project was postponed by the applicant. Subsequently, on

5/14/02, the project was withdrawn by the applicant which resulted in no permit for the development at the City or the Coastal Commission. The City subsequently sued the applicant over the unpermitted development that was present on the site. After this time, the applicant worked with both the Coastal Commission's enforcement staff as well as the City's code enforcement staff to resolve the outstanding violations.

As part of the resolution of the outstanding violations on the subject site (and the related litigation that the City had instituted against the applicant), the applicant entered into a "Stipulated Judgment" with the City of San Diego, dated 4/12/04, and, as agreed upon by the City and the applicant, the applicant then proceeded to seek an amendment to the previous Coastal Development Permit with the Coastal Commission, concurrent with the City's Site Development Permit, to address all the unpermitted development. As explained above, the State Commission amended CDP #F6760 to include the requirements for public access. As noted above, some of the development proposed by the applicant would block access to the area of the offer to dedicate a public access easement that was required in CDP A-133-79/F6760. However, since the Regional Commission permit was issued, this application is referred to as an amendment to both the State Commission permit (A-79-133) and the Regional Commission permit (#F6760).

3. Procedural Issues Raised by the Applicant's Representative. The subject project was scheduled for the May 12, 2005 Commission Meeting. On May 9, 2005, the applicant's representative sent a letter to the Commission requesting a postponement (ref. Exhibit #6). In addition, it was stated in the letter "...it is our position that our clients' application has been deemed approved by operation of law because the Coastal Commission has not complied with the mandatory timeframes within which to act on our clients' application. Therefore, we are reserving our clients' right to assert that the project has already been deemed approved by operation of law prior to this request for a postponement." Subsequently, on May 11, 2005, the applicant's representative submitted another letter (ref. Exhibit #7) that raised a number of procedural issues that are addressed below.

First, the applicant's representative suggests that the application has been deemed approved by operation of law as "over 261 days will have lapsed from filing the Application." However, this is not an accurate statement. The applicant's representative originally submitted a regular permit application on July 22, 2004. On August 20, 2004, Coastal Commission staff notified the applicant that the CDP application was submitted in error, that the application should be an amendment to the existing Coastal Commission permit for the site. On August 24, 2004, the applicant's representative submitted an amendment application to amend CDP #F6760. On September 8, 2004, a letter was sent to the applicant's representative notifying them that the application was non-filed pending submittal of additional information (ref. Exhibit #8). On February 11, 2005, the final requested documents were received and the application was deemed complete and filed. Thus, while the amendment application was submitted on August 24, 2004, it was incomplete and the applicant was notified of such in writing within 30 days as prescribed by the Permit Streamlining Act. Therefore, the Commission is in compliance with the

time limits in the Permit Streamlining Act if it acts on this proposal within 180 days of February 11, 2005, the date that the complete application was filed.

Second, the applicant's representative suggests that his clients did not agree with the Commission staff's conclusion that an amendment was necessary but that nevertheless they submitted an amendment application on 8/24/04. As noted above, in order to settle a case between the City of San Diego and the applicant regarding various violations on the site, the City and the applicant entered into a stipulated judgment. Pursuant to the City of San Diego's Stipulated Judgment (Stipulation in Full Settlement of Final Judgment of Permanent Injunction – ref Exhibit #9 attached), the applicant was not only aware that an amendment to the Coastal Commission CDP was necessary but agreed to do so within 60 days of signing the Judgment. Item #6 on Page 3 of the in the Judgment required that:

Within 60 days from the date of this Stipulated Judgment, Defendants shall submit a complete set of plans (including all necessary drawings reports, calculations, and fees) to the California Coastal Commission ("CCC"), for the purpose of obtaining an amendment to the previously-issued Coastal Development Permit for the PROPERTY (CDP No. F6760 and F6760-A), said amendment to address all previously unpermitted and future proposed grading, clearing, grubbing, excavating, filling, and/or development on the PROPERTY, related to each of the following:...

Thus, it is clear that as part of the City's Stipulated Judgment, the applicant agreed to submit an application for an amendment to the previous coastal development permit for the site to the Coastal Commission. As explained above, the applicant's proposal actually requires amendment to the public access condition of CDP A-133-79/F6760.

The applicant's representative also asserts that Commission staff, eight (8) months after submittal of the application, unilaterally decided to assign a completely different and new application number to the request and that the amendment was to "a permit which does not exist." While it is true that Commission staff notified the applicant that a different application number was being assigned to the project, it was done to accurately reflect the record. As noted above, in 1978, the Regional Commission approved CDP #F6760 for construction of a 3,066 sq. ft. addition to the existing 1,350 sq. ft. single-family residence. After a lawsuit, the Regional Commission permit was appealed to the State Commission and assigned a new number (A-133-79). The State Commission found that additional public access provisions should be required and imposed a special condition requiring the applicant to record offers to dedicate both lateral and vertical public access easements.

It was routine practice at the time for the State Commission to assign a different permit number when a Regional Commission permit was appealed to it. The permit would then be issued with the State Commission number, not the Regional Commission number. Here, however, the Regional Commission permit had been issued during the litigation/appeal and therefore, the permit as initially issued had the F6760 number of the Regional Commission. Thus, the permit is identified by two numbers. It should be noted

that the conditions of approval of F6760 all addressed what construction was approved or how the construction should occur, and are not the type of conditions that continue to apply indefinitely. Thus, since the addition was already completed when the State Commission acted on the appeal, the conditions of F6760 had already been met. Therefore, it was appropriate for the State Commission to simply impose the additional condition that was necessary for public access, rather than reissue the permit with all the conditions. To avoid any confusion, and for the sake of completeness, the permit for the addition is identified as CDP A-133-79/F6760.

The applicant's representative also states that CDP#A-133-79 is invalid because it expired. The Commission disagrees. The State Commission permit, A-133-79, which was an appeal of F6760, was effectively issued at the time it was approved because the development had already commenced. Because the permit that was on appeal had already been issued by the Regional Commission and the addition was already completed, the wording of the condition for public access imposed by the State Commission in A-133-79 indicating that the condition had to be satisfied "prior to issuance of the permit" was an oversight or poor choice of words. The applicant's interpretation would effectively mean that compliance with the condition of approval of A-133-79 is not required and never was required; and that the State Commission action on the appeal was meaningless. The Commission rejects this interpretation and finds that CDP A-133-79 is valid and that the condition of approval continues to apply to the applicant's property.

Lastly, the applicants' representative states that the public notice is incorrect as it indicates that the applicant requested to delete the requirement to dedicate a vertical public access easement. It is stated that a more factual and accurate description of the applicant's application is that a "generous offer" is being proposed to dedicate an easement for lifeguard emergency rescues access consistent with the Commission's recently certified La Jolla Community Plan/LCP Update. However, this statement is incorrect. While the applicant's amendment request does not specifically request deletion of the access easement requirements, this is required to allow the applicant's proposed development that would block the area of the access easement. Prior to submitting the application, the applicant and his representative had been working for many months with Commission staff to develop alternatives for the replacement of the public access requirement as the applicant felt that public access was not safe or appropriate on his site. To document this and the applicant's intent, several letters were submitted by the applicant. In a letter dated November 21, 2003, from the applicant to Lee McEachern (ref. Exhibit #11), it is stated:

I wish to thank you again for taking the time to personally meet with me to both inspect and discuss certain proposed coastal improvements near our residence at 7957 Princes Street, La Jolla, ("property"). **Pursuant to our conversation, we are requesting that in exchange for coastal staff's supporting deletion of the public access requirement on our Property, that we will provide the following Coastal Access Improvements ("Improvements"):** ... emphasis added

Thus, the applicant acknowledged the need to amend the coastal development permit for the property. As such, the project description to replace the requirement that the property owner offer to dedicate a vertical public access easement with 1) an easement for emergency lifeguard access and 2) contribute \$10,000 for public access improvements in the La Jolla area is accurate.

B. Approval Findings and Declarations.

Except as otherwise indicated, the findings in this section apply only to that portion of the application that is described in Part 1 of the Commission's resolution on this permit application, which portion is therefore being conditionally approved.

1. Shoreline Hazards/Scenic Quality. The amendment application requests after-the-fact approval for the removal of a number of unpermitted improvements (wooden timber stairs, retaining walls and palm trees) on the face of the coastal bluff. The applicant also seeks after-the-fact approval of the removal of a portion of a retaining wall in the rear yard. New improvements consist of the construction of an at-grade patio (travertine tile and slate), barbecue, retaining wall and landscaping in the rear yard of a single-family residence. The location of the patio and retaining wall are seaward of the residence on the flattest portion of the site. Other new improvements also include interior modifications to an existing garage which will include the removal of approximately 130 cy. of uncompacted fill material (gravel) and installation of a car lift, which will provide one more parking space in the enclosed garage and interior storage.

Section 143.0143(f) of the City of San Diego's certified LCP Implementation Plan addressing Development Regulations for Sensitive Coastal Bluffs is applicable to the proposed development and states the following:

- (f) All *development* including buildings, *accessory structures*, and any addition to existing *structures* shall be set back at least 40 feet from the *coastal bluff edge*, except as follows:
 - (1) The City Manager may permit *structures* to be located between 25 and 40 feet from the bluff edge where the evidence contained in a geology report indicates that the site is stable enough to support the *development* at the proposed distance from the *coastal bluff edge* and the project can be designed so that it will not be subject to or contribute to significant geologic instability throughout the anticipated life span of the primary *structures*, and no shoreline protection is required. Reductions from the 40-foot setback shall be approved only if the geology report concludes the *structure* will not be subject to significant geologic instability, and not require construction of shoreline protection measures throughout the economic life span of the *structure*. In addition, the applicants shall accept a deed restriction to waive all rights to protective devices associated with the subject property. The geology report shall contain:

- (A) An analysis of bluff retreat and coastal stability for the project site, according to accepted professional standards;
 - (B) An analysis of the potential effects on bluff stability of rising sea levels, using latest scientific information;
 - (C) An analysis of the potential effects of past and projected El Nino events on bluff stability;
 - (D) An analysis of whether this section of coastline is under a process of retreat.
- (2) Accessory *structures* and landscape features customary and incidental to residential uses shall not be closer than 5 feet to the *coastal bluff edge* provided, however, that these shall be located at *grade*. Accessory *structures* and features may be landscaping, walkways, unenclosed patios, open shade *structures*, decks that are less than 3 feet above grade, lighting standards, *fences* and wall, seating benches, *signs*, or similar *structures* and features, excluding garages, carports, building, pools, spas, and upper *floor* decks with load-bearing support *structures*.

The City's implementation plan defines a coastal bluff as follows:

3. Coastal Bluff. Within the Coastal Zone, an escarpment or steep face of rock, decomposed rock, sediment, or soil resulting from erosion, faulting, folding, or excavation of the land mass. It may be flat, curved, or steplike. For the purposes of these regulations, a coastal bluff is limited to those features having vertical relief of ten (10) feet or more. [...]

In addition, the Certified La Jolla Community Plan and Local Coastal Program Land Use Plan (2004) contains numerous policies addressing the protection of coastal bluffs which includes, in part:

The City should preserve and protect the coastal bluffs, beaches and shoreline areas of La Jolla assuring that development occurs in a manner that protects these resources, encourages sensitive development, retains biodiversity, and interconnected habitats and maximizes physical and visual public access to and along the shoreline.

[...]

- Prohibit coastal bluff development, on or beyond the bluff face, except for public stairways and ramps to provide access from the bluff top to the beach or to maintain bluff stability.

- Permit the placement of shoreline protective works, such as air-placed concrete, seawalls, revetments and parapets, only when required to serve coastal-dependent uses or when there are no other feasible means to protect existing principal structures such as homes in danger from erosion, and when such protective structures are designed to eliminate or mitigate adverse impacts on shoreline sand supply... [p. 60]
- Direct roof and surface drainage away from the bluff towards the street or into special drainage facilities that have been equipped to divert water from flowing over the bluff. [p. 60]

The subject site is located on a blufftop lot located at the north end of the cul-de-sac of Princess Street where it meets Spindrift Drive in La Jolla. The bluffs are steep and exist on both the north and west sides of the subject site. The existing residence is located on the flat part of the site close to the street frontage. The applicant is proposing several improvements on the bluff side of the site but they will all be set back adequately from the bluff edge pursuant to the above cited regulations. All proposed accessory improvements will be set back a minimum of 5 feet from the slope/bluff edge, consistent with the certified LCP. The project plans clearly show the contour line (approximately 52 ft. MSL) as the location of the coastal bluff edge as determined by the Commission's technical services staff (ref. Exhibit No. 2). This contour line was used for purposes of setbacks for the proposed improvements, as required by the certified LCP.

From the street frontage, access to the rear yard is gained from the south side of the residence where there is a gate. Beyond the gate there is a concrete walkway and steps which lead down in elevation to the back yard. As one turns the corner of the house in the back yard there is a small flat lawn area immediately adjacent to the house. Grass and other vegetation then cascades down the west-facing and north-facing bluff face of the subject site. Also in the rear yard, on the north side of the residence, there is an improved at-grade concrete patio and a deck at the upper story of the residence. The shoreline below the site is a rocky shoreline and there is no existing physical access through the subject site to this area. However, at very low tide elevations, public access to the beach below is accessible from the north.

There are no existing seawalls or bluff retaining walls in the immediate coastal area and none are proposed with the subject amendment request. The proposed improvements include accessory improvements in the rear yard of the home and the proposed interior garage improvements located outside the geologic setback area. In addition, as part of the after-the-fact improvements, the applicant is removing a portion of a retaining wall in the rear yard that extends beyond the bluff edge. As noted previously, all the proposed new accessory improvements are located 5 ft. or more inland from the bluff edge, consistent with the certified LCP. However, given that the accessory improvements are closest to the bluff edge, there is the potential for these improvements to be subject to threat from erosion in the future leading to request for shore/bluff protection. However, the certified LCP does not allow for shoreline protection devices to protect accessory improvements and the applicant has proposed to waive any rights to future shoreline

protection to protect any of the proposed accessory improvements. Special Condition #2 is attached to memorialize the applicant's proposal.

In addition, the subject amendment also includes a request for after-the-fact authorization for removal of several unpermitted improvements on the face of the coastal bluff. These improvements included several wooden timber stairs, retaining walls and palm trees as well as portions of a retaining wall. Several of these improvements were on the face of the coastal bluff and extended beyond the bluff edge. However, as noted, all of these improvements have been removed. Furthermore, all of the currently proposed accessory improvements in the back yard near the bluff edge are proposed to be sited consistent with the certified LCP and will observe a minimum of 5 foot setback from the bluff edge and are to be at-grade. As such, the proposed development is found to be consistent with the geologic hazard and blufftop setback policies of the certified LCP. A portion of the proposed patio improvements in the rear yard, however, is proposed to be located in the area of the previously required access easement and as such, cannot be permitted (ref. Exhibit No. 3). For this reason, Special Condition No. 1(d) requires that the improvements located in this area be deleted. The details pertaining to these improvements are further discussed in the denial findings of this staff report.

Although the Commission finds that the proposed patio and garage improvements have been designed to minimize the risks associated with their construction, the Commission also recognizes the inherent risk of blufftop development. The proposed accessory improvements will be subject to blufftop erosion. Thus, there is a risk of damage to the accessory improvements as a result of erosion. Given that the applicant has chosen to construct these improvements despite these risks, the applicant must assume the risks. Accordingly, Special Condition #5 requires the applicant to acknowledge the risks associated with this development, waiving any claims against the Commission for injury or damage that may result from such hazards, and agreeing to and indemnify the Commission against claims for damages that may be brought by third parties against the Commission as a result of its approval of this permit. Special Condition #6 requires the permit and findings be recorded to assure future property owners are aware of the permit conditions. In addition, Special Condition #2 advises the applicant that in the event that erosion or bluff failure threatens the retaining wall located in the west yard (blufftop) of the site, patio, barbecue and landscaping, they shall be removed. The retaining wall located in the west yard of the site, patio, barbecue and landscaping are authorized to remain in place only until they are threatened by erosion or bluff failure. The approval of this permit shall not be construed as creating a right to shoreline protection under the certified LCP, and the condition advises the applicants that they waive their rights to constructing any such devices as a result of these improvements.

In terms of protection of scenic quality and the visual resources of the subject site, the certified LCP and the La Jolla Community Plan contain numerous policies addressing the protection of public views to the ocean. Some of these include:

Public views to the ocean from the first public roadway adjacent to the ocean shall be preserved and enhanced, including visual access across private coastal properties at yards and setbacks. (p. 50)

Protect public views to and along the shoreline as well as to all designated open space areas and scenic resources from public vantage points as identified in Figure 9 and Appendix G (Coastal Access Subarea maps). Public views to the ocean along public streets are identified in Appendix G. Design and site proposed development that may affect an existing or potential public view to be protected, as identified in Figure 9 or in Appendix G, in such a manner as to preserve, enhance or restore the designated public views.” (Plan Recommendation 2.c., p. 56)

“Where existing streets serve as public vantage points, as identified in Figure 9 and Appendix G including, but not limited to, view corridors and scenic overlooks and their associated viewsheds, set back and terrace development on corner lots and/or away from the street in order to preserve and enhance the public view provided from the public vantage point to and along the ocean....” (Plan Recommendation 2e, p. 56)

The subject site is located at the northwest corner of Princess Street and Spindrift Drive in La Jolla on a coastal blufftop lot. The site is located within a major scenic viewshed, as identified in the certified Land Use Plan. However, none of the proposed improvements recommended for approval discussed in this part of the report will have any adverse effect on public views of the ocean. The subject property is situated at a lower elevation than Spindrift Drive and as such, none of the improvements on the site would project into the viewline of the ocean as viewed from this street. However, the site is highly visible from public areas to the south, including the Coast Walk Trail, a public trail along the bluffs leading up from a major public access point known as Goldfish Point above La Jolla Caves, which is just north of La Jolla Cove. The trail is used by members of the public for walking, jogging and sight-seeing. In addition, people use the ocean for swimming and kayaking in this area. A popular route with swimmers in the area is from La Jolla Cove to La Jolla Shores and back. Others swim out to different buoys that are located seaward of the Cove and back to the beach at the Cove. The subject site is highly visible from all of these vantage points, not to mention from offshore boats, outside of the “boat free zone”, etc. However in this particular case, none of the proposed improvements will result in an adverse visual impact. The unpermitted improvements that occurred on the site (bluff face structures) have already been removed and the area restored to its former condition. No improvements are proposed to the exterior of the existing two-story residence. All the proposed improvements, with the exception of the BBQ are either interior or at-grade. In this particular case, the proposed BBQ and patio are minor accessory improvements and will not be highly noticeable from any of the public vantage points noted above. Furthermore, the improvements to the garage are all interior and will not be visible. The City, in its review of the development, did, however require that the southern side yard be deed restricted to function as a “view corridor” across the subject site, consistent with the certified LCP which requires that the

side yards be free of obstructions and that only open fencing is installed to enhance public views across properties located between the first public road and sea.

As noted in the language of the certified LCP, because the subject site is located between the first public road and sea and may affect an existing public view to be protected (in this case, a major viewshed) as identified in Figure 9 or Appendix G of the certified LCP, the development must be sited in a manner to preserve, enhance or restore the designated public view. Special Condition No. 3 therefore requires the south yard area be restricted for purposes of ensuring public views in this location are maintained. There is an existing concrete stairway in the southern side yard so no plant materials can be placed in this location. However, beyond the stairway further south along the side yard, there is the potential for the planting of tall trees, etc. which could impede public views to the ocean. For this reason, the condition requires the south yard area will be maintained free of vegetation (no greater than 3 ft. in height), such that no trees or a tall hedge is planted, in order to preserve views of the ocean in this viewshed. It should be noted that this latter area is not within the area of the Offer to Dedicate access easement (ref. Exhibit No. 3). The condition further requires that any fencing in the south yard area (not located within the Offer to Dedicate access easement area) be composed of open materials to assure any existing public views are maintained and potentially enhanced.

Therefore, inasmuch as the applicant is proposing accessory improvements that are consistent with the setbacks from the bluff edge and no improvements are proposed on the face of the coastal bluff, the proposed development is consistent with the certified LCP.

2. Public Access. Because this site is between the sea and the first public road parallel to the sea, pursuant to California Public Resources Code section 30604(c), any development must comply with the public access and recreation policies of the Coastal Act. Several policies of the Coastal Act require that new development protect or enhance public access and recreational opportunities to and along the shoreline. These policies include:

Section 30210

In carrying out the requirements of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. [emphasis added]

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or,

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30223

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

In addition, the certified La Jolla Community Plan and Local Coastal Program Land Use Plan states the following:

The City should ensure that new development does not restrict or prevent lateral vertical or visual access (as identified in Figure 9 and Appendix G) to the beach on property that lies between the shoreline and first public roadway, or to and from recreational areas and designated public open space easements. Further, in areas where physical vertical access to the shoreline does not exist within 500 feet of a private development project on the shoreline, consideration of a new accessway across private property should be analyzed. (p. 52)

Maintain, and where feasible, enhance and restore existing facilities including streets, public easements, stairways, pathways and parking areas to provide adequate public access to the shoreline. Detailed maps and specific subarea recommendations are provided in Appendix G. (p.57)

Section 30604(c) of the Act requires that specific access findings be made for any project located between the first public roadway and the sea. The project site is located between the ocean and the first public roadway (Princess Street/Spindrift Drive). The subject site is at the terminus of Princess Street in the La Jolla community of the City of San Diego. The site is a natural promontory overlooking the La Jolla underwater Park and Ecological Reserve and is bounded on the north and west by the ocean. The beach below the subject site (and to the south) is a small rock/cobble beach bounded by steep bluffs that is only accessible from surrounding beaches, and then only at very low tides and only from the

north (the nearest public access point is adjacent to the Marine Room, approximately ¼ mile to the north). There is no access to this beach from the south due to the existence of steep coastal bluffs and rocky shorelines.

As indicated above, the Commission is approving the request for after-the-fact authorization for removal of several types of physical development, including, but not limited to, wooden timber stairs, retaining walls and palm trees on the face of the coastal bluff and modifications to an existing retaining wall located in the yard (blufftop) of the site. Newly proposed improvements include installation of a patio, barbecue, landscaping and modifications to the existing garage to install a car lift and storage area. All of these improvements can, with slight modifications, be found consistent with the public access and recreation policies of the certified LCP and Coastal Act. This is because none of these improvements, with the exception of a portion of the rear yard patio, will impede vertical public access across the subject site nor will they interfere with the Offer-to-Dedicate vertical access easement area in the side yard. Accordingly, portions of the proposed project have been conditioned to make them consistent with the public access and recreation policies of the Coastal Act.

Specifically, Special Condition No. 1 requires that revised final plans be submitted. The plans must show that no fencing and or other patio improvements be permitted in the side yard in the area of the Offer-to-Dedicate access easement. The Offer to Dedicate access easement (5 feet in width) commences at the street along the southern side yard in the area where there is an existing concrete stairway and steps. Beyond the existing steps/stairway the access easement extends in a northwesterly direction along the top of the slope until it reaches the alignment of the historic path where it then extends in a southwesterly direction, traversing down the face of the bluff, to the beach (ref. Exhibit No. 3).

In addition, Special Condition No. 3 requires revised landscape/yard area/fence plans with provisions to ensure that any permitted fencing does not interfere with the Offer-to-Dedicate access easement area. Conversely, the applicant's proposal to replace the requirement for recordation of an offer to dedicate a vertical public access easement with an easement solely for emergency lifeguard access and the payment of \$10,000 for public access improvements in the area is inconsistent with the governing standards and must be denied, as will be addressed in the subsequent section of this staff report that contains the findings for denial. Therefore, only as limited to the proposed improvements enumerated above and further conditioned can the proposed amendment be found consistent with the public access and recreation policies of the certified LCP and Coastal Act.

3. Unpermitted Development. Unpermitted development has been carried out on the subject site without the required coastal development permit. The applicant is requesting after-the-fact authorization for the removal of the following unpermitted improvements including, but not limited to, wooden timber stairs, retaining walls and palm trees on the face of the coastal bluff and modification to an existing retaining wall located in the yard (blufftop) of the site. In addition, the failure to record the required lateral and vertical offer to dedicate public access easement pursuant to Coastal Development Permit No.

A-133-79-A1 is a violation of the California Coastal Act.

Although development has taken place prior to the submission of this amendment request, consideration of the request by the Commission has been based solely upon the certified City of San Diego LCP and the public access and recreation policies of the Coastal Act. Commission action upon the permit amendment does not constitute a waiver of any legal action with regard to the alleged violations of the Coastal Act that may have occurred; nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal development permit. To ensure that the unpermitted development component of this application is resolved in a timely manner, Special Condition #6 requires that the applicant satisfy all conditions of this permit amendment which are prerequisite to the issuance of this amendment within 60 days of Commission action. In addition, Special Condition #4 advises the applicant that all of the terms and conditions (including the requirement to record an Offer to Dedicate public access easement, both lateral and vertical) of the original approval of Coastal Development Permit #A-133-79/F6760 still remain in full force and effect.

4. Local Coastal Planning. The subject site is zoned RS-1-7 and is designated for residential use in the certified La Jolla Land Use Plan. The proposed project is consistent with that zone and designation. The subject site consists of a sensitive coastal bluff as identified in the City's certified LCP. The Environmentally Sensitive Lands (ESL overlay) regulations of the City's implementation plan are thus applicable to the subject site. The proposed improvements, as conditioned, are consistent with the ESL overlay.

The certified La Jolla Community Plan and Local Coastal Program Land Use Plan contains policies that address shoreline protective devices, protection and improvement of existing visual access to the shoreline, and policies stating that ocean views should be maintained in future development and redevelopment. In addition, the certified LUP requires that structures be set back adequately from the coastal bluff to protect the geologic integrity and visual resources of the coastal bluffs and shoreline areas. As conditioned, the proposed development is consistent with the shoreline hazards provisions and all other relevant provisions of the certified LUP. It is also consistent with the public access and recreation policies of the Coastal Act. Therefore, the proposed development, as conditioned, is consistent with the certified LCP and the relevant policies of the Coastal Act and can be approved.

5. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the certified LCP and the public access and recreation policies of the Coastal Act. Mitigation measures, including conditions addressing final plans (adequate blufftop setbacks/ location of offer to dedicate access easement/accessory improvements), revised landscape/yard area fence plans to assure protection of public views, assumption of risk and timing for condition compliance will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

C. Denial Findings and Declarations

Except as otherwise indicated, the findings in this section apply only to that portion of the proposed amendment that is described in part 2 of the Commission's resolution on this permit amendment application, which portion, is therefore, being denied.

1. Public Access and Recreation. Because this site is between the sea and the first public road parallel to the sea, pursuant to California Public Resources Code section 30604(c), all development at the site must comply with the public access and recreation policies of the Coastal Act. Several policies of the Coastal Act require that new development protect or enhance public access and recreational opportunities to and along the shoreline. These policies include:

Section 30210

In carrying out the requirements of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. [emphasis added]

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or,

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30223

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

In addition, the certified La Jolla Community Plan and Local Coastal Program Land Use Plan states the following:

The City should ensure that new development does not restrict or prevent lateral vertical or visual access (as identified in Figure 9 and Appendix G) to the beach on property that lies between the shoreline and first public roadway, or to and from recreational areas and designated public open space easements. Further, in areas where physical vertical access to the shoreline does not exist within 500 feet of a private development project on the shoreline, consideration of a new accessway across private property should be analyzed. (p. 52)

Maintain, and where feasible, enhance and restore existing facilities including streets, public easements, stairways, pathways and parking areas to provide adequate public access to the shoreline. Detailed maps and specific subarea recommendations are provided in Appendix G. (p.57)

Section 30604(c) of the Act requires that specific access findings be made for any project located between the first public roadway and the sea. The project site is located between the ocean and the first public roadway (Princess Street/Spindrift Drive). The subject site is at the terminus of Princess Street in the La Jolla community of the City of San Diego. The site is a natural promontory overlooking the La Jolla underwater Park and Ecological Reserve and is bounded on the north and west by the ocean. The beach below the subject site (and to the south) is a small rock/cobble beach bounded by steep bluffs that is only accessible from surrounding beaches at very low tides, and then only from the north (the nearest public vertical access point is adjacent to the Marine Room, approximately ¼ mile to the north). There is no access to this beach from the south due to the existence of steep coastal bluffs and rocky shorelines.

The proposed amendment involves a proposal to modify the special condition that requires recordation of an Offer to Dedicate (“OTD”) easements for public access to and along the shoreline (vertical and lateral easements, respectively) by replacing the

requirement for the *vertical* public access easement with a requirement for an OTD for a vertical easement solely for emergency lifeguard access *and* that \$10,000 be contributed to the Coastal Conservancy for access improvements in the area. Also proposed are patio improvements which consist of an at-grade BBQ and patio to the rear of the residence and other minor accessory improvements. As noted above, there have been a number of previous Commission actions regarding development on the subject site. In June 1978 the San Diego Coast Regional Commission approved CDP F6760 (applicant: Jane Baker) for the construction of a 3,066 sq.ft., addition to the house. The project was appealed (A-221-78) on the basis that, among other things, it allegedly would have resulted in the direct loss of public access to the beach from an intermediate location between La Jolla Shores and Devil's Slide. The State Commission rejected the appeal and the Regional Commission approved the CDP# F6760 on 6/2/78. The applicant signed and dated the permit on 8/15/78. The applicants commenced with construction.

On September 15, 1978 an appellant petitioned the Superior Court for a writ or mandate challenging, among other things, the adequacy of the Commission's access findings. On February 27, 1979 the Trial Court remanded the project back to the San Diego Coast Regional Commission (SDCRC) for more specific findings on public access and recreation. In March of that year, the SDCRC adopted public access findings in connection with its re-approval of the permit, but it did not require any public access mitigation. This decision was then appealed to the State Commission (ref. CDP Appeal #A-133-79 – Exhibit #4). In its decision on September 20, 1979, the State Commission found that because the proposed addition, which had already been built by the time the Commission acted, displaced a trail that had been used historically and continuously by the public for access to the shoreline below (as well as providing an important viewpoint), and because adequate access did not exist nearby, alternative public access should be required elsewhere on the site. The Commission also addressed the safety issue, finding that the trail was "well worn" and that "it was not difficult to walk down the bluff face and, if minor improvements were made, the access way could be easily traversed with little damage to the landforms." Accordingly, to offset the burdens the development imposed on the public's constitutional right of access and to ensure consistency of the project with the public access provisions of the Coastal Act, the Commission required provision of alternative access on the site by requiring the applicant to record an Offer to Dedicate a vertical public access easement (from Princess Street down the bluff to the beach) as a condition of project approval. The wording of that special condition is as follows:

Public Access: Prior to issuance of the permit, the applicant shall submit, for review and approval of the Executive Director, a document irrevocably offering to dedicate to a public agency or private association approved by the Executive Director easements for public access to and along the shoreline in accordance with the provisions of this condition. The approved document shall be irrevocable for a period of 21 years running from the date of recordation. The documents shall be recorded free of all prior liens and encumbrances except for tax liens and shall constitute a covenant running with the land in favor of the People of the State of California binding the applicant, heirs, assigns, and

successors in interest to the subject property. The documents shall provide for offers to dedicate easements for:

a. Lateral Access along the shoreline. The easement shall extend across the ocean frontage of parcel from the toe of the bluff seaward to the mean high tide line; where sea caves exist, the easement shall extend to the inland extent of the cave. The easement shall allow for passive recreational use by the public and shall allow accepting agency to post sign indicating that marine life cannot be removed from the area.

b. Vertical Access extending from Princess Drive to the mean high tide line. The easement shall be 5 feet in width and shall extend along the southern edge of the property adjacent to the garage and down the bluff along the trail currently existing on the site. The exact location of the easement shall be plotted on a map subject to the review and approval of the Executive Director and shall be attached as an exhibit to the recorded document.

The easement shall be available for public pedestrian use from sunrise to sunset and for emergency rescue operations 24 hours per day. The terms of the easement shall allow the accepting agency, with the concurrence of the Coastal Commission or its successor in interest, to construct improvements to the accessway to ease the public's ability to reach the shoreline. The easement shall also allow the accepting agency to post signs informing the public of the existence of the accessway.

Nothing in this condition shall be construed to constitute a waiver of any sort or a determination on any issue of prescriptive rights or public trust lands which may exist on the parcel itself or on the designated easement.

However, as noted earlier, the court had not enjoined the applicant from continuing with the development when the court remanded the original permit, and thus, the requirement for recordation of the OTD was imposed after the development was already complete, and the applicant never recorded the offer, in violation of the ultimate permit and, thus, the Coastal Act. Indeed, the ultimate permit authorizing the addition to the house has never even issued. On September 20, 1979, the Notice of Intent to Issue Permit was issued to the applicant with a single special condition, as repeated above. There is no record that this condition was fulfilled nor is there any evidence of a signed permit in the Commission's files.

In an attempt to resolve this violation(s), the current owner and applicant has proposed to revise the requirement for recordation of the OTD for a vertical public access easement and by replacing it with an easement solely for emergency lifeguard access and a payment of \$10,000 to the Coastal Conservancy for public access improvements in this area. The applicant contends that it is not safe to allow the public to climb down the bluff to the beach at this location and that there is no place for the public to park. The

Commission is extremely concerned with such a request in that it suggests that a legitimate requirement to offer a public access easement on private property can be eliminated if a certain amount of money is provided to make access improvements elsewhere. Moreover, as indicated above, the Commission already addressed the safety issue and found it not to be an impediment to the OTD requirement, and the amount of money being offered would not be enough to secure an equivalent access easement in an alternative location nearby. Were the proposed condition change the only element of this amendment request, Commission staff would have had to reject this request without even bringing it to the Commission, pursuant to section 13166 of the Commission's regulations, as it is in direct conflict with the intent of the existing permit. Moreover, the applicant's proposal to eliminate the requirement to record a public access easement across the subject site cannot be found consistent with the public access and recreation policies of the Coastal Act. Deleting the public access easement would not provide maximum public access (as required by Section 30210) and would not prevent development that interferes with the public right of access acquired through use (as required by Section 30211). In addition, an LCP has been certified since the Commission's 1979 action, and the current proposal cannot be found consistent with the public access policies of the certified LCP either.

a. Inconsistency of Proposed Amendment with the Coastal Act Access Policies.

In CDP Appeal #A-133-79, the Commission found that there is evidence of historical public access on this site. The Commission found substantial evidence that the public had obtained rights of access through that use – i.e., that there has been such use as would support the conclusion that an area has been impliedly dedicated to public use. The intent of the Commission's action on the previous appeal was to preserve public access at this site. The current proposal is in direct conflict with prior Commission action and, therefore, is not consistent with the Coastal Act policies cited above.

Although the Commission cannot determine whether public prescriptive rights actually do exist, as that determination is made by a court of law, Section 30211 requires the Commission to prevent development from interfering with the public's right of access to the sea where acquired through use. As a result, where there is substantial evidence that such rights may exist, the Commission must ensure that proposed development would not interfere with any prescriptive rights which may exist. In this case, the Commission concluded in 1979 that there is substantial evidence of such rights, and that the development approved under that permit did interfere with the exercise of those rights.

In this particular case, there are very descriptive summaries of evidence establishing public access and recreational use at the project site that was prepared by the University of San Diego Legal Clinics which represented the appellant in appeal #A-133-79. This evidence includes testimony from individuals, public agencies, diving organizations, etc., attesting to the use of the historic public access trail and its use by members of the public over the years. Local planning documents also discuss the importance of the access.

The Commission, in its review of the 1979 appeal, found that because access to the small pocket beach that exists below the subject property and to the south is only available at the lowest of tides due to the protrusion of several promontories, and because there are no other vertical access points to this beach, that adequate access does not exist nearby. The Commission further found that although the public had historically had access over the project site, construction of the residential addition precluded the public from using the historic access, thereby diminishing the public's right to access the beach and as such, an alternative access must be provided to offset the burden the development placed on the public's constitutional right of access and assure consistency with 30212 of the Coastal Act. Therefore, the Commission required the applicant to record an Offer To Dedicate a public access easement. The OTD area for the vertical easement is a 5 ft. wide area that follows the southern property boundary extending from Princess Street adjacent to the garage of the residence, then follows along the top of the slope, across the face of the bluff to the trail that existed on the site and then down the bluff to the beach (ref. Exhibit #3). Although the top portion of the easement area is accessible via existing concrete steps, the remainder of the easement area is covered with vegetation over a steep bluff face that is now physically challenging to traverse, but if ever improved, could again be an excellent public access point to the beautiful pocket beach and tidepools located below and to the south of the subject site.

In addition, acceptance of the benefits of a permit precludes both a later challenge and efforts to eliminate mitigation measures such as OTDs. The applicant at the time received the benefits of the 1979 coastal development permit by having the addition to the house since 1979. The case law is uncontroverted that one cannot seek to relieve themselves of the burdens of a permit years after having accepted the benefits.

b. Inconsistency of Proposed Amendment with Public Access Policies of the Certified LCP

The proposed project, which would result in the elimination of an offer-to-dedicate vertical access easement across the subject site, is inconsistent with the public access policies of the certified LCP as well. As cited previously, the policies of the certified LCP require that new development not restrict or prevent lateral, vertical or visual access to the beach on property that is located between the first public road and the sea. Furthermore, the LCP also provides that existing facilities, including public easements, pathways, etc. that provide public access to the shoreline be maintained and where feasible, enhanced and restored. In addition, the certified LCP also includes subarea maps that show existing and proposed physical access to the shoreline. The LCP map that includes the project site area has a notation across several shoreline properties that states "To be analyzed for potential future public access from public r.o.w. to shoreline across private property." In this particular case, the removal of the requirement to record a vertical public access easement across the subject site is in direct contradiction to the above policies of the certified LCP because it would not only "restrict" and "prevent" vertical access, it would altogether eliminate it. Furthermore, the subject proposal, in direct conflict with the certified LCP, does not maintain, enhance or restore a pathway (which in this case, consisted of a previous pathway used for public access).

c. Safety Issue

The City, in its review of the current proposal, determined that access to the beach from the location of the access easement previously required by the Commission would not be safe and instead, required that the applicant provide an easement for emergency lifeguard access on an as-needed basis for rescues. The City decided that, due to the steepness of the bluffs in this area, it did not want to encourage the public to gain access to the shoreline at this location. In addition, it found that the coastal bluffs in this area would be subject to degradation if any formal public access were constructed on the bluff face. The City also found that the beach in this area is very isolated and remote (only accessible at the lowest of tides), that the area directly off shore is not safe for swimming due to some unique geologic features protruding from the ocean floor, and that because of its location well removed from any other public areas, access and patrol/monitoring by lifeguards would be difficult. Thus, the City required the easement for emergency lifeguard access should a rescue in this area be needed.

However, the Commission finds the City's conclusion to be insufficient justification to delete the requirement to record the OTD for public access across the site. Although many years have passed since the original permit was approved and subsequent appeals and some of the site conditions may have changed, the essential facts remain the same-- the site was previously used for public access to the beach and this access was blocked as a result of the addition to the home by the former owner of the property. Further, while the access easement will extend over a steep bluff, the Coastal Commission's staff Coastal Engineer has reviewed the project and determined that it would be feasible to construct improvements to facilitate access to the beach within the required access easement. Based on the above discussion, the Commission concludes that public access can be provided consistent with public safety.

The proposed amendment to delete the OTD requirement is clearly inconsistent with Coastal Act Sections 30210 and 30211 since it will result in the removal of an OTD accessway that was required to replace an existing trail documented through historic public use that lead down the bluff face to a pocket beach and the ocean which was physically blocked by the previous addition to the residence. Development cannot be permitted to interfere with the public's right of access to the sea where acquired through use. In this particular case, the Commission found that there was historic public use of this trail and therefore, the access across the site must be protected. To approve the subject proposal, which would include the removal of the requirement to record the OTD, would set an adverse precedent that suggests that removal of historic public access is acceptable. This is clearly inconsistent with the policies of the certified LCP, in addition to the public access and recreation policies of the Coastal Act. Therefore, as enumerated above, the proposal to remove the offer to dedicate a vertical public access easement must be denied.

In addition, any proposed patio or BBQ improvements that are located within the portion of the site where the offer to dedicate access easement is located must also be denied as

they would interfere with the potential for establishing such an access easement in the future. In order to further assure that the proposed development does not interfere with the future Offer to Dedicate a public access easement, any proposed fencing across the southern side yard shall not be permitted.

2. Local Coastal Planning. The subject site is zoned RS-1-7 and is designated for residential use in the certified La Jolla Land Use Plan. The subject site consists of a sensitive coastal bluff as identified in the City's certified LCP. The proposed changes are inconsistent with the public access and recreation policies of the certified LCP.

The certified La Jolla Community Plan and Local Coastal Program Land Use Plan contains policies that address improvement of existing visual and physical access to the shoreline. The proposed amendment, which includes the proposed replacement of the requirement to record an offer to dedicate a public access easement across the site with a requirement for an easement for emergency lifeguard access only and contribution of \$10,000 for public access improvements in the area, is inconsistent with the public access policies of the certified LCP. The Commission found that there is substantial evidence of historic prescriptive use of the public trail that used to exist on the subject site. Inasmuch as the subject proposal would result in the removal of the requirement for an Offer to Dedicate that public access easement which was required previously to mitigate for displacement of an existing trail to accommodate a residential addition, the proposed development is not consistent with the public access provisions of the certified LUP or the public access and recreation policies of the Coastal Act and should be denied.

3. California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available, which would substantially lessen any significant adverse effect that the activity may have on the environment.

As described above, the proposed project would have adverse impacts on public coastal access. There are feasible alternatives or mitigation measures available such as the no project alternative that would eliminate any potential impacts on public access to this area. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act because there are feasible alternatives, which would lessen significant adverse impacts, which the activity would have on the environment. Therefore, the project must be denied.